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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1895

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners [1] request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 612 F.2d 1249 and is reprinted in Appendix A to this

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[1] Petitioners are Allied Chemical Corporation, E. I. du Pont de Nemours & Company, Kaiser Aluminum & Chemical Sales, Inc., Kaiser Aluminum & Chemical Corporation, Pennwalt Corporation, Racon Incorporated and Union Carbide Corporation.

petition.[2] The Court of Appeals' judgment and writ of mandamus appears in Appendix B. The Court of Appeals vacated in part the order of the United States District Court for the Western District of Oklahoma (Bohanon, J.), granting petitioners'[3] motion for a new trial. The trial court's "rulings and comments on [petitioners'] motions for judgment n.o.v. and for a new trial," which has not been reported, is appended to the opinion of the Court of Appeals and is reprinted in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1979 (Pet. App. B). On March 5, 1980, the Court of Appeals entered an order denying a timely petition for rehearing and suggestion for rehearing en banc (Pet. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The district court granted petitioners' motion for a new trial in this case on unexceptionable and traditional grounds—that petitioners had been deprived of a fair trial and that the jury's damage award was grossly excessive. Despite the discretionary nature of this action, the Court of Appeals thereafter issued a writ of mandamus overturning the new trial order and reinstating the verdict as to liability. In so doing, the Court of Appeals held that an appellate court is au-

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[2] The appendices are bound separately in a companion volume, which is referred to herein as "Pet. App."

[3] Petitioners were the defendants in the trial court.

thorized to determine on mandamus whether a new trial order represents an abuse of discretion—the same standard that applies on appeal. The question presented is as follows:

Whether the Court of Appeals erred in issuing a writ of mandamus, overturning an order granting a new trial and reinstating a jury verdict as to liability, on the asserted ground that the district court abused its discretion in entering the new trial order.

STATUTORY PROVISIONS INVOLVED

This case involves the All Writs Act, 28 U.S.C. § 1651 (a), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. They are reprinted in Appendix F.

STATEMENT OF THE CASE

This petition arises from a private antitrust suit brought by respondent, Daiflon, Inc. ("Daiflon"), against petitioners, the domestic manufacturers of refrigerant gas. Daiflon, an importer of refrigerant gas, brought this action under Sections 1 and 2 of the Sherman Act, claiming that petitioners had entered into a conspiracy to drive it out of business and that petitioner Du Pont, completely apart from the alleged conspiracy, had monopolized and attempted to monopolize a portion of the refrigerant gas industry. Petitioners disputed Daiflon's claims and contended, in addition, that Daiflon's failure was caused by Daiflon's unique operating problems and by governmental action—the imposition in August 1971 of a 10 percent surcharge on imports[4] and the subsequent devaluation of the dollar as against the Japanese yen.

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[4] Shortly after this surcharge was imposed, Daiflon's president informed Daiflon's Japanese supplier that the surcharge would

Proceedings in the Trial Court

The complaint in this case, which was amended on three separate occasions, was accompanied by extensive discovery.[5] As the case progressed toward trial, the district court entered a series of pretrial orders requiring the parties to exchange documents they intended to offer at trial and to identify by page and line number the deposition testimony they intended to read to the jury. At the final pretrial conference, held at the end of the week preceding commencement of the trial, the district court expressed dissatisfaction with Daiflon's compliance with the pretrial orders. The court noted that Daiflon had failed, despite repeated urgings by the defendants and the express requirements of the pretrial orders, to inform the defendants of the documentary and deposition evidence it intended to offer at trial. Tr. of March 2, 1979, pp. 47-48.

The case was tried before a jury in March 1979. Although the trial court expressed serious reservations concerning the merits of Daiflon's case, it denied petitioners' motions for a directed verdict at the close of Daiflon's case-in-chief and at the close of all the evidence, and submitted the case to the jury. The Special

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have a "disastrous" effect on Daiflon's importing business. Thereafter, Daiflon did not place any orders for refrigerant gas with its suppliers.

[5] On September 3, 1974, the trial court dismissed the action because of Daiflon's persistent refusal to provide adequate answers to an interrogatory asking for its operating costs, a matter of great importance in this case. The trial court's dismissal was reversed by the Court of Appeals. Daiflon, Inc. v. Allied Chemical Corp., 534 F.2d 221 (10th Cir.), *cert. denied*, 429 U.S. 886 (1976).

Verdict returned by the jury on March 30, 1979, found against all of the petitioners. Specifically, the jury purported to find by a preponderance of the evidence that petitioners had conspired with each other in violation of the antitrust laws; that Du Pont's share of the relevant market during the relevant period exceeded 50 percent; that Du Pont willfully and unlawfully had acquired and attempted to acquire monopoly power; and that, as a consequence of all of these unlawful acts, Daiflon had suffered damages before trebling in the amount of $2,500,000.

Petitioners thereafter filed timely motions for judgment notwithstanding the verdict and, alternatively, for a new trial. The memorandum in support of the motion for judgment n.o.v. argued that Daiflon had failed to adduce substantial evidence of a conspiracy among any or all of the petitioners or of monopolization or attempted monopolization by Du Pont. The memorandum also pointed out that the undisputed evidence showing that Du Pont accounted for only 40 percent of the sales in the relevant market precluded, as a matter of law, a verdict in Daiflon's favor on the individual monopolization claims. Petitioners also noted that there had been a complete failure of proof as to damages, much less any evidence supporting the jury's award of $2,500,000. Finally, in the memorandum in support of the motion for a new trial, petitioners demonstrated additionally that a number of events at trial, including the receipt into evidence of a mass of inadequately qualified and otherwise inadmissible documents, had deprived them of a fair trial.[6]

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[6] The memoranda submitted by petitioners in support of their motions for judgment n.o.v. and for a new trial are reproduced in the separate Appendix being filed with this petition (*see* Pet. App. G and H).

On May 14, 1979, following receipt of a responsive memorandum on behalf of Daiflon, the trial court heard oral argument in connection with the motions for judgment n.o.v. and for a new trial. At the conclusion of the oral argument, the court denied the motion for judgment n.o.v. and granted the motion for a new trial.

The court prefaced its comments on the motions by stating that "[t]he Court has one object and only one object, and that is to see that the parties have a fair trial. No other object, no other interest, and no other concern." App. A, p. 23a. The court then explained that Daiflon's failure to comply with pertinent provisions of the pretrial orders had substantially prejudiced petitioners. *Id.* at 24a. The court also observed that, because of Daiflon's noncompliance with the pretrial orders, serious error had occurred with respect to the admission of certain exhibits. *Id.* at 27a-28a.

The court then turned to the matter of damages, stating that it "was shocked when the verdict was read of $2,500,000 * * *." *Id.* at 28a. As the court explained:

> "[G]enerally Daiflon was insignificant; and the Japanese treatment by this country, the surtax, and the exchange of the dollar—this had a tremendous amount of effect upon what happened to the plaintiff.
>
> "* * * If you consider the earnings, 1969, 1970, 1971, there is no basis upon these earnings by the company to project that they lost $2,500,000." * * * *Id.* at 26a.

As a means of dealing with the problems that had occurred at trial, the court indicated that it would entertain requests for further discovery and outlined

a method for resolving evidentiary disputes, to the extent possible, prior to the retrial. *Id.* at 27a. Finally, the court observed generally with respect to the new trial motion:

> "The Court finds that there was not a fair trial, and this Court has a duty to see that there is a fair trial. The Court has no love for the defendants and no love for the plaintiff[ ] in this case, but there was not a fair trial, say from beginning to end." *Id.* at 25a.

Proceedings in the Court of Appeals

On May 25, 1979, Daiflon requested the Court of Appeals to issue a writ of mandamus directed to Judge Bohanon instructing him to reinstate the jury verdict. After receiving petitioners' response[7] and a reply from Daiflon, the Court of Appeals entered an order directing the parties "to prepare and sign a narrative statement of the case along the lines provided in Rule 10(d) of the Rules of Appellate Procedure," with each side to "prepare a summary of the evidence presented by it at the trial."[8] App. D, pp. 32a-33a. The stated purpose of the order was to permit the Court of Appeals "to judge the exercise of discretion on the part of the trial judge * * *." *Id.* at 32a.

In the introduction to their narrative statements, submitted in response to this order, petitioners urged

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[7] Judge Bohanon, the nominal respondent in the Court of Appeals, advised the court that he would not make any appearance in the case.

[8] Rule 10(d) provides that a statement of the case that is prepared jointly by the parties, conforms to the truth, and is approved

that mandamus is not available to review a discretionary determination by a trial court. In addition, petitioners advised the court by letter that they did not agree that the narrative statements, which had been prepared by the parties individually rather than jointly and had not been approved by the trial judge (as required by Rule 10(d)), could be utilized as a substitute for the trial record.[9]

The Court of Appeals issued its judgment and writ of mandamus on December 21, 1979. It directed the district court to restore the verdict of the jury as to liability, while permitting the court to proceed with a new trial on damages.

In its accompanying opinion, the Court of Appeals acknowledged that an appeal does not lie from an order granting a new trial and stated that the "primary question in the case is whether * * * an extraordinary writ [28 U.S.C. § 1651(a)] can be employed to review the validity of the order of the trial court granting a new trial." *Id.* at 5a-6a. The court then considered opinions of this Court governing the availabil-

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by the trial court, may be used as the record on appeal, in lieu of the papers and exhibits filed in the district court and the transcript of proceedings in that court.

[9] Petitioners' narrative statement set forth the facts relating to the reasons advanced by the trial court for granting petitioners' motion for a new trial—that the damage award was excessive and that petitioners were deprived of a fair trial. Since, in requesting the writ, Daiflon had not urged the Court of Appeals to review liability issues, these issues were not addressed in petitioners' narrative statement, although the Court of Appeals was referred to petitioners' post-trial motions and memoranda, which were appended to petitioners' answer to Daiflon's petition. *See* Pet. App. G and H. These memoranda set forth petitioners' position on the liability issues as well as on other issues presented at the trial.

ity of mandamus, concluding with this analysis of *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978):

> "Plain abuse of discretion or abuse of power which add up to mere erroneousness was said not to furnish a basis for interlocutory review by writ. Justice Blackmun specially concurred in the Rehnquist opinion. The Burger, Brennan, Marshall and Powell dissent maintained that the clear abuse of discretion standard set forth in *La Buy* [v. *Howes Leather Co.*, 352 U.S. 249 (1957)] was still a valid basis for issuance of a writ of mandamus.
>
> "Granted that erroneousness does not constitute a valid ground for issuance of the writ. Nevertheless, it cannot be said that the clear abuse of discretion standard is repudiated." *Id.* at 10a.

After thus having adopted a "clear abuse of discretion" standard for review on mandamus, the Court of Appeals turned to the reasons advanced by the trial court for ordering a new trial. As to the trial court's determination that petitioners had been deprived of a fair trial, the Court of Appeals apparently believed that the determination was based on the trial court's observations concerning the jury's lack of comprehension of the issues. The trial court's view of the significance of Daiflon's noncompliance with the pretrial orders, requiring an exchange of documentary and deposition evidence, was discounted by the Court of Appeals. *Id.* at 18a-19a. Similarly, the Court of Appeals refused to credit the trial court's determination that it had erred in receiving exhibits, because "the judge does not specify as to which of these were improperly received and there is no way to ascertain this." *Id.* at 19a.

The Court of Appeals also stated, as to liability, that the trial judge "indicated his belief that it was established. If he had doubts about this, he would have granted the defendants' motion for judgment notwithstanding the verdict." *Id.* at 19a. Although there was no record before it and the liability issues had not been briefed or argued, the Court of Appeals stated that "this is not a case in which the evidence to establish liability is vague and questionable." *Id.* at 19a-20a.

Finally, the Court of Appeals reluctantly upheld the trial court's order to the extent that it granted a new trial on damages. The Court of Appeals stated that the damage issue is one of fact whereas liability involves questions of law and, therefore, that the district court had more discretion on damage questions. *Id.* at 21a. As the Court of Appeals said, "the trial court did hear the evidence in its entirety and hence it is in a much better position to judge this issue than is an appellate court." *Id.* at 20a.

Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc. Among other things, the petition brought to the attention of the Court of Appeals the fact that it had erred in concluding that the trial court had no reservations concerning the strength of Daiflon's case on liability. The petition urged that, if the writ of mandamus were not denied, at the very least the matter should be remanded to afford the trial court an opportunity to provide a full statement of its views on all of the grounds advanced by petitioners in their motion for a new trial, including their contention that the jury's verdict on liability was contrary to the weight of the evidence and otherwise was flawed.

The petition for rehearing was denied by the Court of Appeals in a pro forma order entered on March 5, 1980 (Pet. App. C).

Further Proceedings in the District Court and Court of Appeals

Shortly after the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc, Daiflon, in a letter to the trial court, stated "the position of the plaintiff" that "the Court's impartiality may reasonably be questioned" and suggested the appropriateness of the court's voluntary recusal from further proceedings. Following the receipt of a letter from petitioners, the trial court entered an order on April 7, 1980, withdrawing from the case.

The trial court made clear in its April 7 order that it was not withdrawing because of "any feelings of prejudice or interest," charges that the court rejected in its order. Pet. App. E, p. 37a. Rather, the court's withdrawal was based solely on its judgment that it could not in good conscience retry the case in accordance with the mandate of the Court of Appeals. As the court explained:

> "The trial court saw and heard all the evidence (approximately four weeks of trial) and had a clear understanding of the evidence and issues before the jury; based upon what the trial court knew, it had to, in honesty, grant defendants' motion for new trial as to all issues. The court unequivocally stated that to permit the verdict to stand and not grant a new trial, the court would be dishonest and cowardly. What more can a judge say regarding his feeling that a new trial was required? The court observed that if it did not grant a new trial, it would have been exceedingly lazy. What more can a judge say to show his feeling

that a new trial was essential for justice to be done in this case?

* * *

"Nor can the court candidly state that its refusal to grant defendants a judgment notwithstanding the verdict * * * should be considered any proof of the liability of the defendants, as urged by the circuit court.

* * *

"If this court were to retry the cause on the basis of the mandate, for the reasons hereinbefore stated, it could not be satisfied with the result. The court is passionately convinced that the issue of liability has not been proven, though there exists some evidence otherwise. Further, any verdict of damages must be founded upon a totality of the evidence—including that evidence bearing upon the question of liability." *Id.* at 35a-36a.

Following receipt of this order, petitioners moved in the Court of Appeals for leave to file a second petition for rehearing and suggestion for rehearing en banc. In the rehearing petition attached to that motion, petitioners noted that the sole basis for reinstatement of the liability verdict was the Court of Appeals' view that "as far as liability is concerned the judge indicated his belief that it was established." Pet. App. A, p. 19a. Petitioners pointed out that in view of the trial court's statement in its April 7 order that "the issue of liability has not been proven" in this case, there is no basis for reinstatement of the jury's verdict as to liability.[10]

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[10] Petitioners' motion for leave to file a second petition for rehearing and suggestion for rehearing en banc has not yet been ruled upon by the Court of Appeals. In the unlikely event the Court of Appeals has not disposed of the second rehearing petition before this Court otherwise is prepared to act on this petition, this Court may of course delay consideration of the petition until the

REASONS FOR GRANTING THE WRIT

The procedural posture of this antitrust case prior to the intervention of the Court of Appeals was hardly unique or extraordinary. An experienced trial judge, who had lived with this case throughout its pretrial phase and presided over a four-week jury trial, had granted petitioners a new trial on entirely appropriate and traditional grounds—that petitioners had been deprived of a fair trial and that the jury's damage award had been grossly excessive.

What makes this case extraordinary and significant, and worthy of this Court's attention, is the Court of Appeals' review, by way of mandamus, of the trial court's order granting a new trial for the purpose of determining whether that court abused its discretion. In so doing, the Court of Appeals undermined the previously well-settled, black-letter proposition that a new trial order is interlocutory in nature and not appealable under the final judgment rule. The Court of Appeals' opinion in this case invites litigants dissatisfied with trial court rulings on motions for a new trial—indeed, dissatisfied with any of the host of interlocutory rulings made routinely by trial courts—to seek immediate review of those rulings in the courts of appeals. This use of the writ of mandamus, to review a discretionary determination of a trial court, is in direct conflict with decisions of this Court and of other courts of appeals announcing and applying rigorous criteria to govern mandamus.

In fact, the decision in this case illustrates dramatically the dangers of permitting appellate courts to review on mandamus interlocutory orders, such as

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Court of Appeals has reached a decision on the pending motion and second rehearing petition.

orders granting a new trial. In traditional appellate proceedings, there would be a full record before the Court of Appeals and briefing and argument of all issues tendered by the parties. None of these safeguards to measured and careful consideration of the issues was present in this extraordinary mandamus proceeding. As a result, the Court of Appeals' reinstatement of the jury's verdict as to liability rests upon a demonstrably incorrect assumption concerning the district court's views on liability. At the same time, the Court of Appeals' opinion contains numerous misstatements with respect to the evidence at trial on the liability issues. These misstatements were all but inevitable given the fact that the Court of Appeals did not have before it in this extraordinary proceeding a single page of the trial transcript or any but a handful of the hundreds of documents that were admitted into evidence. In refusing to remand this case to the district court for a fuller statement of that court's views on liability, the Court of Appeals improperly invaded the province of the district court, effectively precluded that court from exercising its discretion on issues raised in petitioners' post-trial motions, and reached a decision that is untenable as a matter of fact and law.

The Decision in This Case Conflicts With Decisions of This Court and Other Courts of Appeals on the Important Question of the Standards Governing Mandamus

1. It is settled, of course, that an order granting a new trial is interlocutory in nature and therefore is not immediately appealable.[11] This settled rule reflects

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[11] The cases so holding are legion. *E.g.*, Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253 (1940); Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-85 (1933); Dassinger v.

a fundamental policy decision that has been made by Congress,[12] and endorsed repeatedly by this Court,[13] that in all but the most exceptional of circumstances the benefits that may be realized in permitting piecemeal review are far outweighed by the attendant costs —measured in terms of expense to the litigants, delay in concluding litigation on its merits, and the inevitable drain on scarce judicial resources.

In view of the important policies embodied in the final judgment rule, this Court has been at pains to caution appellate courts against permitting mandamus

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South Central Bell Telephone Co., 537 F.2d 1345, 1346 (5th Cir. 1976) (per curiam); Evans v. Calmar Steamship Co., 534 F.2d 519, 522 (2d Cir. 1976); Richardson v. Communications Workers of America, 469 F.2d 333, 334-35 (8th Cir. 1972) (per curiam) *cert. denied*, 414 U.S. 818 (1973); Pellagrino v. Ford Motor Co., 424 F.2d 241, 242 (6th Cir. 1970) (per curiam); Eady v. Foerder, 381 F.2d 980, 981 (7th Cir. 1967); De Pinto v. Provident Security Life Insurance Co., 323 F.2d 826, 838 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); 11 Wright & Miller, *Federal Practice and Procedure* § 2818 (1973), and cases discussed therein.

[12] Congress has, of course, carved out a limited exception to the final judgment rule in 28 U.S.C. § 1292(b). Respondent did not even attempt to use 28 U.S.C. § 1292(b)—which requires the consent of the trial judge and of the Court of Appeals—to obtain immediate appellate review of the district court's order granting a new trial. *See* Pet. App. A, p. 6a.

[13] *E.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Catlin v. United States, 324 U.S. 229 (1945); Cobbledick v. United States, 309 U.S. 323 (1940); *see also* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181-82 (1955).

This Court approved in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), a narrow exception to the final judgment rule. Because of its carefully limited nature, there is no reported instance of a new trial order being reviewed under the *Cohen* exception.

to be used as a substitute for appeal. Thus, this Court has emphasized that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy." *Will* v. *United States,* 389 U.S. 90, 95 (1967) (quoting from *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212 (1945)). The burden of establishing that "exceptional circumstances" exist rests, of course, upon the petitioner, who must show "that its right to issuance of the writ is 'clear and indisputable,'" *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 384 (1953) (quoting from *United States* v. *Duell,* 172 U.S. 576 (1899)).

One of the major vices of the present decision is that, while paying lip service to these basic principles, the Court of Appeals has fashioned in this case an entirely new standard to govern review on mandamus. The Court of Appeals acknowledged here that "an orthodox appeal pursuant to § 1291 of the Judicial Code [28 U.S.C. § 1291] is not a possibility because * * * [t]he grant of a new trial is not a final judgment." Pet. App. A, p. 6a. The court also recognized that the district court's new trial order was in response to a timely motion for a new trial, and had been based upon grounds urged in that motion, so that this is not a case of the trial court's acting beyond its prescribed jurisdiction. *Id.* at 7a. The court proceeded nevertheless to overturn the new trial order pursuant to a curiously formulated "abuse of discretion" standard—a standard that it endeavored to justify by means of the plurality and dissenting opinions in *Will* v. *Calvert Fire Insurance Co.,* 437 U.S. 655 (1978).

According to the Court of Appeals, the plurality opinion in *Will* v. *Calvert Fire Insurance* simply reaffirms the proposition that "[p]lain abuse of discretion or abuse of power which add up to mere erroneousness" do not provide a basis for mandamus. Pet. App. A, p. 10a. The court then went on to construe the dissenting opinions in the case as endorsing an "abuse of discretion" standard on mandamus, and attempted to harmonize that standard with the plurality opinion (*id.* at 10a-11a):

> "Granted that erroneousness does not constitute a valid ground for issuance of the writ. Nevertheless, it cannot be said that the clear abuse of discretion standard is repudiated. So, therefore, if it is found that there is disregard for proper procedure, or misuse of judicial power in the trial judge's conduct, this would constitute clear abuse of discretion."

It is difficult to conceive of a standard for mandamus with more potential for abuse and inconsistent decision-making, or posing a greater threat to the final judgment rule, than the standard fashioned by the Court of Appeals in this case. That standard is made all the more alarming by the fact that the Court of Appeals' opinion in this case is the first purportedly comprehensive analysis by an appellate court of the law governing mandamus since this Court's decision in *Will* v. *Calvert Fire Insurance.* If the decision in this case is permitted to stand, litigants in the Tenth Circuit, if not elsewhere, will be able to obtain immediate appellate review of orders granting a new trial by the simple expedient of casting their arguments in terms of an abuse of discretion by the trial court. Review by this Court is warranted to prevent the ob-

vious damage this license would entail to the final judgment rule.[14]

2. Review by this Court also is warranted because, in fact, the Court of Appeals' decision in this case is in direct conflict with decisions of this Court and other courts of appeals on the important question of the standards governing mandamus. Fairly read, *Will* v. *Calvert Fire Insurance* does not support use of an "abuse of discretion" standard on mandamus. Indeed, Mr. Justice Rehnquist referred pointedly in that case to the "dangers" of issuing a writ of mandamus "upon a mere showing of abuse of discretion * * *." 437 U.S. at 665 n. 7. This Court's decision in *Will* v. *United States, supra,* is to the same effect; the Court there vacated the writ that had been issued because of the discretionary nature of the underlying order and, at the same time, emphasized that (389 U.S. at 98 n. 6)—

> "[c]ourts faced with petitions for the peremptory writs must be careful lest they suffer themselves

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[14] The damage to the final judgment rule caused by the Court of Appeals' decision in this case obviously is not limited to situations involving the award of a new trial. Prior to the decision in this case, immediate appellate review was available only for the "small class" of interlocutory orders falling within the collateral order doctrine and for orders meeting the rigorous criteria established by Congress in 28 U.S.C. § 1292(b). *See* notes 12 and 13 *supra.* The decision in this case threatens to engulf these narrow, carefully structured exceptions to the final judgment rule. If litigants dissatisfied with new trial orders are permitted to obtain immediate appellate review under an abuse of discretion standard, there is no principled way to deny litigants dissatisfied with other interlocutory orders a comparable opportunity to convince an appellate court that the order represents an abuse of discretion. This provides yet another compelling justification for review of the present decision by this Court.

> to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. * * *'' [15]

Prior to the decision in the present case, litigants rarely attempted to use the All Writs Act to obtain immediate appellate review of new trial orders. This undoubtedly is attributable to the fact that the award of a new trial inevitably involves a large element of discretion—so that rarely if ever can it be said that a litigant's right to issuance of the writ to overturn a new trial order, on other than jurisdictional grounds, is "clear and indisputable." *Bankers Life & Casualty Co.* v. *Holland, supra,* 346 U.S. at 384.[16] Indeed, this is the first case, since the All Writs Act was enacted, in

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[15] *See also* Kerr v. United States District Court, 426 U.S. 394, 403 (1976) ("A judicial readiness to issue a writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the] judgment of Congress" embodied in the final judgment rule.).

[16] The extent to which the decision in this case departs from and conflicts with previously settled law is illustrated by the fact that the Court of Appeals was able to identify only three cases in which mandamus has been used to overturn a new trial order. Pet. App. A, p. 14a-15a. In two of those cases, the trial court had lacked jurisdiction to order a new trial—and the orders were vacated on that basis. Peterman v. Chicago, Rock Island & Pacific Railroad Co., 493 F.2d 88 (8th Cir.), *cert. denied,* 417 U.S. 947 (1974); Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied,* 344 U.S. 921 (1953). *See also* United States v. Smith, 331 U.S. 469 (1947) (a case, not cited by the Court of Appeals, in which mandamus was used to vacate a new trial order defective on jurisdictional grounds). In the only other case identified by the Court of Appeals, Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971), the court concluded that certain aspects of the new trial order violated Rule 50(b) of the Federal Rules of Civil Procedure and that the court therefore had "exceeded judicial power" (Waterman, J., concurring) in ordering a new trial.

which a new trial order based on a trial court's determination of error in the admission of documentary evidence or lack of a fair trial has been disapproved on mandamus. As the Eighth Circuit concluded in *General Motors Corp.* v. *Lord,* 488 F.2d 1096, 1100 (1978) —a case, like the present, involving a request for mandamus to overturn a new trial order based on the erroneous admission of evidence:

> "This evidentiary question, which was the essential question addressed by the trial court, is no different than any other evidentiary issue trial judges decide in the course of granting motions for a new trial. To grant extraordinary relief here would be to abrogate the final judgment rule, and allow any litigant, who is forced to retrial on an evidentiary question, immediate review simply by styling his action a petition for writ of mandamus instead of appeal. The resolution of this question at this time would have little impact on the administration of justice generally and, since it is clear that the trial court had jurisdiction to act, mandamus is clearly inappropriate." [17]

In sum, certiorari is warranted here because the decision in this case frustrates the important policies embodied in the final judgment rule and is in direct conflict with controlling decisions of this Court and with

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[17] *Accord, e.g.,* In re United States, 598 F.2d 233 (D.C. Cir. 1979) ("[I]t is not the office of mandamus to correct erroneous interlocutory orders that are within the trial court's jurisdiction * * *.") ; Pat Ryan and Associates, Inc. v. Du Pree, 17 F.R. Serv. 2d 86 (4th Cir. 1973) (opinion not officially reported) ; Thorn v. Parkland Chevrolet Co., 416 F.2d 95 (4th Cir. 1969) (per curiam) ; Bigart v. Goodyear Tire & Rubber Co., 361 F.2d 317 (2d Cir. 1966) (per curiam) ; Atlantic Coast Railroad Co. v. Sonenshine, 226 F.2d 220 (4th Cir. 1955) ; Southern Pacific Co. v. United States District Court, 190 F.2d 735 (9th Cir. 1951).

a virtually unbroken line of cases from other Circuits. There is no basis for distinguishing this case from other cases in which trial courts have applied proper legal standards—centering on the erroneous admission of documentary evidence and the lack of a fair trial—in granting timely motions for a new trial. If mandamus is made available under the "abuse of discretion" standard formulated here by the Court of Appeals, any error—or arguable error—in the granting of a new trial or in the issuance of numerous other interlocutory orders would entitle the disappointed party to immediate appellate review. Review by this Court is urgently needed to prevent this drastic, and unwarranted, expansion of previously settled limitations on the use of mandamus.

3. In fact, the decision in this case illustrates, in most dramatic fashion, the dangers of permitting appellate courts to review new trial orders on mandamus. In ordering reinstatement of the liability verdict, the Court of Appeals proceeded on a palpably incorrect assumption as to the trial court's views on the liability issues presented in this case. The court steadfastly refused to alter this assumption despite undisputed evidence showing that the assumption was incorrect, and despite the fact that the Court of Appeals did not have the benefit of the trial record, an agreed statement of relevant facts in lieu of the trial record, or any briefing on the liability issues.

The Court of Appeals' suggestion that reinstatement of the verdict as to liability is justified because "[n]one of the trial judge's comments were directed to inadequacy of the evidence to establish the conspiracy that is charged" (Pet. App. A, p. 20a) is untenable for a

number of reasons, not the least of which is that it misses the essential point of the district court's comments in setting aside the liability verdict.[18] The district court held that it had erred, because of the failure of respondent to comply with the court's pretrial orders, in admitting a number of documents into evidence—and that, as a result of those errors as well as other factors, petitioners had been deprived of a fair trial. *Id.* at 25a, 28a. The court noted, specifically, that Daiflon had prevailed upon the court to admit many documents under the business records exception to the hearsay rule, even though there had been no testimony or other evidence establishing their status as business records. *Id.* at 28a. Although the court did not refer to these documents by exhibit number, petitioners' memorandum in support of their motion for a new trial identified 95 documents that had been received into evidence without the slightest predicate being laid for their admission.[19] Pet. App. H, p. 112a-113a. The fact that 17 of the 28 exhibits that Daiflon's counsel mentioned during his closing argument to the jury were not identified in any manner during the trial provides some indication of the extent to which the jury's verdict as to liability was premised on inadmissible documentary "evidence." *See id.* at 113a.

In view of the district court's conclusion that a mass of inadequately-qualified documentary material had

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[18] Rule 52(a) of the Federal Rules of Civil Procedure provides clearly that a new trial motion is not one that requires any supporting findings of fact or conclusions of law. *See, e.g.*, 5A Moore, *Federal Practice* § 52.08 (1979-80 Supp.), and cases cited therein. The Court of Appeals did not even attempt to reconcile this fact with its review of the new trial order entered in this case.

[19] Almost all of these documents were admitted on the issue of liability rather than damages.

been received into evidence, depriving petitioners of a fair trial, there was no reason for the court to dwell at length on the weakness of Daiflon's liability evidence. Nevertheless, the Court of Appeals was in error in suggesting that none of the district court's comments in granting a new trial were directed at the liability issues. *Id.* at 20a. The district court pointed out, for example, that Daiflon's counsel had succeeded in making "a lot out of things that are really not important, as I view it from this evidence * * *." *Id.* at 24a. The court also noted with respect to Daiflon's conspiracy claim, which depended on the jury's finding collusion from similar conduct by petitioners in meeting competitive situations, that petitioners "had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise. This is what they did in places, but they did it in rare places * * * where they met competition, but generally Daiflon was insignificant * * *." *Id.* at 26a

The district court's comments in connection with petitioners' motion for a directed verdict, made at the close of Daiflon's case-in-chief and renewed just prior to submission of the case to the jury, also confirm the inaccuracy of the factual assumption underlying the Court of Appeals' reinstatement of the liability verdict. The court stated at the close of Daiflon's case-in-chief, for example, that, "up to this point, I think the Court could say that [Daiflon's] case was pretty thin on * * * conspiracy." Trial Tr. of March 20, 1979, p. 25. Following the close of all the evidence, the court again noted the weakness of Daiflon's liability evidence. While informing the parties that the case would be submitted to the jury, the court stated (Excerpt of Proceedings of March 23, 1979, pp. 3-4):

> "The Court, in giving this to the jury, the Court has, as you must know, quite a lot of doubt about it, apprehension about it, which I will not go into now. * * *
>
> "Now, the Court is somewhat in doubt as to whether [it] should submit [the case] to the jury * * *."

If, despite these statements by the trial court, the Court of Appeals has entertained serious doubts about the trial court's position on the liability issues, those doubts should have been removed by the order issued by the district court following the Court of Appeals' denial of the first rehearing petition filed by petitioners. That order, which is reprinted in Appendix E and is quoted at pages 11-12, *supra,* speaks eloquently to the trial court's motivations in granting petitioners a new trial on all issues in the case—and confirms, perhaps most significantly, the trial court's view "that the issue of liability has not been proven * * *."[20] Pet. App. E, p. 36a.

In sum, the Court of Appeals' decision in this case confirms the wisdom of the admonition in *Will* v. *United States, supra,* against appellate courts "suffer[ing] themselves to be misled by labels such as 'abuse of discretion' * * * into interlocutory review of nonappealable orders * * *" (389 U.S. at 98 n. 5). In reinstating the liability verdict in this case, the Court of Appeals (1) relied on a factually inaccurate assumption as to the trial court's views on liability and (2)

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[20] Significantly, Daiflon has never even attempted to defend the factual assumption underlying the Court of Appeals' reinstatement of the liability verdict—that is, that the trial judge "indicated his belief that [liability] was established" (Pet. App. A, p. 20a).

lacked any independent basis to assess liability—that is, the Court of Appeals did not have before it in this extraordinary proceeding the documentary evidence admitted at trial, a single page of the trial transcript, an agreed upon statement of relevant facts in lieu of the trial record or any briefing on the liability issues in the case.[21] Particularly in view of the trial court's

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[21] Indeed, while the Court of Appeals proceeded to make factual findings on liability, it admitted that "[t]o the present day we are in the dark as to the identity of the defendants' witnesses and the testimony which was given by them" (Pet. App. A, p. 3a). One of the principal reasons no comprehensive summary of the liability evidence could be prepared is that, to this day, substantial portions of the trial record have not even been transcribed.

An important example of the problems faced by the Court of Appeals in attempting to deal with the liability issues without even a marginally adequate record is provided by the Court of Appeals' suggestion that a conspiracy was established in this case by evidence that petitioners "lowered their prices by 13%, thus foregoing substantial profits." Pet. App. A, p. 20a. Since there is nothing in the comments made by the district court in granting petitioners' motion for a new trial that supports that assertion and, as noted, the Court of Appeals did not have before it any portion of the trial record or an agreed upon statement of the facts, the basis of this assertion must remain a mystery In fact, the evidence at trial showed that none of the petitioners lowered their prices at any time by 13 percent, that the price reduction of which Daiflon complained was made independently by various of the petitioners over a nine-month period, and that the price reduction that occurred was motivated by legitimate business considerations, increasing rather than decreasing petitioners' short- and long-term profits. *See* Pet. App. G, pp. 70a-78a. Indeed, since Daiflon's sales of refrigerant gas never accounted for more than a fraction of one percent of total industry sales, the notion that petitioners (accounting for the bulk of the remaining 99 percent of industry sales) would decrease their prices by 13 percent in order to drive Daiflon out of business borders on the ludicrous. *See id.* at 76a-77a.

The inaccuracy of this pivotal factual assertion by the Court of Appeals demonstrates beyond doubt the unfairness of that court's attempting to assess liability in the context of a mandamus proceeding and reinstating the jury's verdict as to liability.

statement, in withdrawing from any further proceedings in this case, that "liability has not been proven" (Pet. App. E, p. 34a), there is not even a colorable basis for the Court of Appeals' reinstatement of the liability verdict.[22]

4. The Court of Appeals' abuse of the mandamus power in this case is also shown by its refusal to remand the case to the trial court for a fuller statement of its views on liability and for a ruling on the grounds for a new trial that were not dealt with by the trial court.[23] This Court's decision in *Platt* v. *Minnesota*

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[22] The suggestion that the trial judge should have granted petitioners' motion for judgment n.o.v. if he entertained any doubts as to liability and that, having denied that motion, an appellate court can assume that there was sufficient evidence of liability to invalidate a new trial order (Pet. App. A, 19a), represents a clear error of law. The suggestion is, of course, untenable in view of the different standards that apply to motions for judgment n.o.v. and for a new trial. *See, e.g.*, 11 Wright & Miller, *Federal Practice and Procedure* § 2806 (1973), and cases cited therein.

Similarly, the Court of Appeals' suggestion that the question of damages involves issues of fact, while liability involves simply "a question of or questions of law" (Pet. App. A, p. 21a), is mistaken. If that suggestion were taken at face value, there would be no reason for a jury determination on liability. In the present case, petitioners strongly disputed each of Daiflon's factual allegations with respect to liability. *See* Pet. App. G, pp. 45a-84a; Pet. App. H, p. 108a.

[23] Included in the arguments advanced in petitioners' motion for a new trial were that Daiflon's evidence both as to conspiracy and monopolization was deficient in a number of critical respects (Pet. App. H, p. 108a) and that the district court had erred in refusing to strike the testimony of one of Daiflon's liability witnesses who admitted on cross-examination that the conclusions he had proffered during his direct testimony were "inaccurate and misleading." *Id.* at 108a-110a.

Mining & Mfg. Co., 376 U.S. 240 (1964), is dispositive in this regard.

Platt was a mandamus proceeding in which the Court of Appeals determined that the trial court had relied on an improper factor in denying a criminal defendant's transfer motion. The Court of Appeals then issued a writ ordering the transfer. This Court reversed. It held that the trial court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer. It said that the function of the Court of Appeals was to determine the appropriate criteria and then leave their application to the trial judge on remand. Noting that extraordinary writs are reserved for truly extraordinary causes and then only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so, this Court said:

> "Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used 'to actually control the decision of the trial court' [citation omitted]." 376 U.S. at 245.

This is precisely the usurpation of judicial power exercised by the Court of Appeals here. In purporting to make its own findings on the liability issues in the case and issuing a writ of mandamus on this basis, it improperly "control[led] the decision of the trial court" and precluded it from exercising its discretion on numerous important issues presented by petitioners' new trial motion.

CONCLUSION

In reviewing, by way of mandamus, an order granting a new trial, the Court of Appeals' decision in this case is plainly inconsistent with recent decisions of this Court and other courts of appeals. If permitted to stand, the decision in this case will be seen by litigants as an open-ended invitation to obtain immediate appellate review of interlocutory orders by casting their papers in the form of a mandamus petition rather than an appeal. In fact, the decision in this case provides overwhelming evidence of the importance to sound judicial procedure of previously settled limitations on mandamus—and of the dangers of permitting, in the context of an extraordinary proceeding, immediate appellate review of new trial orders.

Petitioners respectfully suggest that this Court should not only issue a writ of certiorari but should also enter an order of summary reversal. The decision of the Court of Appeals is palpably erroneous and, so long as it stands, will cause confusion in the lower federal courts. There will in any event be a new trial in this case before a new judge. Summary reversal would merely assure that liability as well as damages would be re-tried—in accordance with the judgment of the trial judge who heard "the evidence in its entirety and hence is in a much better position" than an appellate court acting without a trial record to determine the propriety of a new trial. There already would have been such a retrial, in accordance with the trial court's order that was entered more than a year ago, were it not for the Court of Appeals' erroneous intervention in the matter.

Summary reversal by this Court will eliminate, without further delay, the decision of the Court of Appeals as a precedent and significantly facilitate an expeditious final resolution of this litigation.

Respectfully submitted,

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